

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

FAHS ROLSTON PAVING CORP.,  
Plaintiff,  
v.  
PENNINGTON PROPERTIES  
DEVELOPMENT CORP., INC.,  
et al.,  
Defendants.

CIVIL ACTION NO. 03-4593 (MLC)

**MEMORANDUM OPINION**

COOPER, District Judge

The third-party defendant, Maynard Fahs ("Fahs"), moves to dismiss the third-party complaint filed by the defendants/third-party plaintiffs, Pennington Properties Development Corp., Inc. ("PPDC"), Westrum Pennington, L.P. ("Westrum"), Peter Blicher, and Mark Ellenbogen (collectively, the "third-party plaintiffs"), for failing to state a claim upon which relief may be granted, pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). The Court, for the reasons stated herein, will deny the motion.

## BACKGROUND

The plaintiff, Fahs Rolston Paving Corp. ("Fahs Rolston Paving") entered into an agreement with PPDC and Westrum on June 23, 1999 (the "June 1999 Agreement") to develop a piece of property in Lawrence Township, New Jersey (the "Evans Tract"). (Dkt. entry no. 45, 3d Party Ps. Ans., Counterclaim, and 3d Party Compl., at 21, ¶ 1.) Fahs, as a director, shareholder, and

principal officer of Fahs Rolston Paving, "negotiated the purchase of a component of the Evans Tract to develop an Assisted Living Residence Facility Lot." (Id. at ¶ 2.) "On behalf of [Fahs Rolston Paving], . . . Fahs agreed to purchase, develop, manage and operate the Assisted Living Residence Facility Lot." (Id.)

In this regard, "Fahs represented that he and [Fahs Rolston Paving] had the experience, skill and financial ability to purchase and develop the Assisted Living Residence Facility Lot." (Id. at ¶ 3.) However, Fahs, in or around September 2000, informed the third-party plaintiffs – contrary to what he represented in the summer of 2000 – that Fahs Rolston Paving "could not obtain financing to fulfill its obligations under the Agreement because the assisted care living industry was in disarray." (Id. at ¶ 4.) Because Fahs could not obtain financing, PPDC and Westrum had to find a new purchaser for the Evans Tract. (Id. at ¶ 10.)

Fahs Rolston Paving brought an action for breach of contract against the third-party plaintiffs on September 26, 2003. (Dkt. entry no. 1.) The third-party plaintiffs filed an answer, counterclaim, and third-party complaint on November 1, 2005. (Dkt. entry no. 45.) The third-party complaint asserts a claim of breach of contract against Fahs. Fahs moved to dismiss the third-party complaint on February 8, 2006. (Dkt. entry no. 47.)

## **DISCUSSION**

### **I. Standard of Review for 12(b)(6) Motion**

A complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). On a motion to dismiss, the Court must accept as true all of the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001). "Dismissal of claims under Rule 12(b)(6) is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim upon which relief may be granted." Jakomas v. McFalls, 229 F.Supp.2d 412, 419 (W.D. Pa. 2002).

The Court, when considering a motion to dismiss, may generally not "consider matters extraneous to the pleadings." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). However, if the Court exercises discretion and permits a party to present matters outside the pleadings, the Court must (1) convert the motion to dismiss into one for summary judgment, and (2) allow the parties a reasonable opportunity to present all material pertinent to such a motion under Rule 56. Fed.R.Civ.P. 12(b). An exception to this general rule is that the Court may consider (1) exhibits attached to the complaint, (2) matters of public record, and (3) all documents that are integral to or explicitly relied upon in the complaint without

converting the motion to dismiss into one for summary judgment. Angstadt v. Midd-West Sch. Dist., 377 F.3d 338, 342 (3d Cir. 2004) (citation omitted).<sup>1</sup>

Fahs, in moving to dismiss under Rule 12(b)(6), relies on materials beyond the allegations of the third-party complaint, including his signed affidavit, and his testimony in an arbitration hearing as part of an action in the New Jersey Superior Court. (See Fahs Br.; Fahs Aff., at ¶ 15.) The Court will not consider any of these additional documents submitted by Fahs because they are neither relied upon by the third-party plaintiffs, nor integral to the third-party complaint. Fahs's testimony at any arbitration hearing constitutes evidence outside the third-party complaint, and the Court will not consider such documentation on a motion to dismiss.<sup>2</sup>

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<sup>1</sup> "The rationale underlying this exception is that the primary problem raised by considering documents outside the complaint – lack of notice to the plaintiff – is dissipated where the plaintiff has actual notice and has relied upon the documents in framing the complaint." Jones v. Intelli-Check, Inc., 274 F.Supp.2d 615, 625-26 (D.N.J. 2003) (citations omitted).

<sup>2</sup> The Court notes that the third-party plaintiffs have included a certification from Anne P. McHugh with their opposition brief. (3d Party Pls. Br., at 1-2; 2-7-06 Cert. of Anne P. McHugh ("McHugh Cert.")) Attached to the McHugh Cert., inter alia, are various pieces of correspondence relating to the purchase of the Evans Tract, and a copy of the June 1999 Agreement. The Court, for the reasons discussed infra, will not consider this affidavit or any of the attached correspondence in resolving the motion. However, the Court will consider the June 1999 Agreement as it is integral to and explicitly relied upon in the third-party complaint.

## **II. The Motion to Dismiss**

Fahs has moved to dismiss the third-party complaint because he argues that the third-party plaintiffs' claims that Fahs made representations in the summer of 2000 are "directly contradicted by the record." (Fahs's Br., at 7.) Specifically, Fahs explains that he "has already testified under oath that he did not have any discussions with [the third-party plaintiffs] until September 2000." (Id. (emphasis in original)). The third-party plaintiffs oppose the motion solely on the basis that the Court should deny the motion to permit them to conduct Fahs' deposition and other discovery. (3d Party Pls. Br., at 4.)

The third-party plaintiffs allege in the third-party complaint that Fahs made misrepresentations to them about Fahs Rolston Paving's ability to complete financing for the purchase of the Evans Tract. Also, they appear to allege that Fahs breached the June 1999 Agreement, even though Fahs is neither a signatory nor a party to the agreement. (3d Party Compl., at ¶ 11; McHugh Cert., at Ex. B.) As such, the third-party plaintiffs appear to assert a fraud or fraudulent inducement claim, but only particularly indicate a breach of contract claim.

Despite the inconsistent and possibly inadequate allegations in the third-party complaint, Fahs's argument in support of his motion attacks only the factual accuracy of the allegations in the third-party complaint. This is an improper argument to

support a motion to dismiss under Rule 12(b)(6). Fahs cannot contest the factual accuracy of the third-party plaintiffs' allegations because, for the purposes of this motion, the Court must accept as true all of their factual allegations. Doe, 257 F.3d at 313. Thus, the Court must accept as true the allegations regarding possibly conflicting statements made by Fahs regarding the June 1999 Agreement. The conflicting statements may possibly support a claim of fraud or fraudulent inducement. Accordingly, the Court will deny the motion to dismiss.

#### **CONCLUSION**

The Court, for the reasons discussed herein, will deny the motion to dismiss for failure to state a claim upon which relief may be granted. However, because the allegations in the third-party complaint fail to sufficiently describe the cause of action against Fahs, the Court will deny the motion without prejudice and with leave for Fahs to contest the legal sufficiency of the breach of contract claim or to require that the fraud claim be pleaded with particularity as required by Rule 9(b). The Court will issue an appropriate order.

s/ Mary L. Cooper  
**MARY L. COOPER**  
United States District Judge